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No. 07-785

IN THE

Supreme Court of the United States

ERIC WALLACE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

REPLY BRIEF

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REPLY BRIEF

The government concedes that there is a direct conflict between the rule of decision applied by the D.C. Court of Appeals here and that applied by several other state Supreme Courts. The government nevertheless offers a hodge-podge of legal and policy arguments to avoid this Court's review. Its legal arguments miss the mark, however, and its policy arguments are refuted by the facts of this case — facts that the government's opposition astonishingly omits.

The constitutional guarantee of Due Process ensures that a defendant who has pleaded guilty nonetheless retains the right to contest the trial court's competency determination on direct review. The court below deprived Eric Wallace of that federal constitutional right, and it did so in a situation in which failure to provide direct review made all the difference: Mr. Wallace had previously been found incompetent to stand trial and had been sent to St. Elizabeth's hospital for eight months of treatment and evaluation; his physicians at St. Elizabeth's confirmed unambiguously and repeatedly that he was incompetent; and the D.C. Court of Appeals conceded that (even under its erroneous and misguidedly narrow approach) this was a "difficult case." Pet. App. 1a. Due Process forbids "the conviction of an accused person while he is legally incompetent," *Pate v. Robinson*, 383 U.S. 375, 378 (1966), and yet that is exactly what happened here. Review by this Court is thus necessary.

I. The Decision Below Exacerbates A Square Conflict Among State Courts Of Last Resort.

Although conceding that both the New York Court of Appeals and the Vermont Supreme Court would have permitted Mr. Wallace to challenge the trial court's competency determination on appeal notwithstanding his guilty plea, the government argues that the split is illusory because the decisions of those courts allegedly "do not make clear . . . whether they rest on the federal Constitution." Opp. 11. That argument provides no basis for denial of review.

First, the government is wrong: Both the New York Court of Appeals in *People v. Armlin*, 332 N.E.2d 870 (N.Y. 1975), and the Vermont Supreme Court in *State v. Cleary*, 824 A.2d 509 (Vt. 2003), relied on the federal Constitution.

In *Armlin*, the N.Y. Court of Appeals rejected the State's contention that the defendant's plea had waived his right to appeal his competency determination, holding that "there is an inherent contradiction in arguing that a defendant may be incompetent," yet sufficiently understand the consequences of a waiver of the right to claim incompetency on appeal when he pleads guilty. *See* 332 N.E.2d at 874. For that proposition, the court cited two and only two cases. The first was this Court's federal due process decision in *Pate v. Robinson*. The second was the dissent in the intermediate appellate court decision that *Armlin* reversed, *People v. Armlin*, 43 A.D.2d 782 (N.Y. App.

Div. 1973), *modified by*, 332 N.E.2d 870 (N.Y. 1975), which itself stated that failure to allow the defendant to appeal "constituted a violation of his constitutional right to a fair trial," citing *Pate v. Robinson* as support. *Id.* at 784. *Armlin* thus squarely relied on the federal Due Process Clause. *See generally Ohio v. Robinette*, 519 U.S. 33, 37 (1996) (holding that state court decision was based on federal law when "the only cases it discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution").

Likewise, in *Cleary*, the Vermont Supreme Court relied principally on *Pate*, *Armlin*, and *United States v. Muench*, 694 F.2d 28 (2d Cir. 1982), which held that the federal Constitution allows criminal defendants to appeal directly ineffective assistance claims notwithstanding a guilty plea. *Cleary*, 824 A.2d at 512.[1] Given the *Cleary* court's reliance on these decisions, it is clear that the court based its decision on federal due process grounds.

Second, any ambiguity in *Armlin* and *Cleary* counsels in favor of review, rather than against it. It has long been settled that this Court will resolve ambiguity regarding the grounds of a state court's decision by presuming that the state court relied on federal constitutional law. *See, e.g., Pennsylvania v.*

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[1] The Vermont Supreme Court's subsequent decision in *In re Torres*, 861 A.2d 1055 (Vt. 2004), confirms the federal basis for that court's *Cleary* decision. The court there cited *Cleary* as an example of the "limited exceptions to the waiver rule," along with *United States v. Muench* and this Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985). 861 A.2d at 1057-58.

Labron, 518 U.S. 938, 941 (1996) (assuming state court decision based on federal law absent a "'plain statement' sufficient to tell [the Court] 'the federal cases [were] being used only for the purpose of guidance, and d[id] not themselves compel the result that the court ha[d] reached'") (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). That "*Michigan v. Long* presumption" applies with particular force here, because both the New York Court of Appeals and the Vermont Supreme Court have frequently made explicit when they are citing federal constitutional cases merely to bolster their interpretation of state law. *See Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1278 (N.Y. 1991) ("[O]ur State law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the result we reach."); *State v. Brunelle*, 534 A.2d 198, 200 (Vt. 1987) ("Although federal cases are discussed herein, we base our decision exclusively on the provisions of the Vermont Constitution."). The absence of similar language in *Armlin* or *Cleary* speaks volumes.

Indeed, the case for applying the presumption is exceptionally strong here. In *Long*, *Robinette*, *Labron*, and other similar cases, the ambiguity in the state court's decision implicated this Court's jurisdiction. Here, this Court's jurisdiction is unquestioned — the D.C. Court of Appeals squarely rejected Mr. Wallace's federal due process arguments on the merits. Pet. App. 4a-7a. Any purported ambiguity in *Armlin* and *Cleary* thus goes solely to the extent of the confusion in the state and federal

courts, and not to this Court's jurisdiction to resolve the question presented.

Third, as noted in the petition, Pet. 13-16, the decisions in *Armlin* and *Cleary* reflect a broader consensus that is at odds with the decision below. The government does not dispute, for example, that the Michigan Court of Appeals has held that defendants such as Mr. Wallace are entitled to challenge their competency decisions on appeal as a matter of federal due process. *See People v. Parney*, 253 N.W. 2d 698, 699 (Mich. Ct. App. 1977) (per curiam). And although the government correctly notes that *King v. Cunningham*, 442 F. Supp. 2d 171 (S.D.N.Y. 2006), is a federal habeas decision, it does not deny that the district court found "fundamentally flawed" the precise argument that the government advances here, namely that the defendant "forfeited his mental competency claim upon entry of a guilty plea." *Id.* at 185; *see also State v. Wead*, 609 N.W.2d 64, 68 (Neb. Ct. App. 2000) (invoking "the sanctity of constitutional protections" in holding that a guilty plea did not foreclose appeal of a competency determination); *Thompson v. Commonwealth*, 56 S.W.3d 406 (Ky. 2001) (invoking federal due process cases to support the determination that a guilty plea did not waive the right to appeal a denial of a competency hearing required by state statute). Thus, regardless of whether these decisions standing alone would create a conflict sufficient to warrant this Court's review, *cf.* Opp. 13 n.4, they demonstrate that the court's holding below conflicts with a great number of decisions, and thus merits this Court's attention.

II. The Decision Below Conflicts With This Court's Decisions.

The decision below is also worthy of review because it conflicts with decisions of this Court and violates the Constitution's promise of Due Process and fundamental fairness in our criminal justice system.[2]

As demonstrated in the petition, Pet. 19-22, although a defendant forfeits many important constitutional rights when he pleads guilty, he does not surrender claims that implicate the State's power to force a defendant to answer the criminal charge in the first place. In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that double jeopardy is such a claim. *Menna* explained that where "the claim is that the State may not convict [the defendant] no matter how validly his factual guilt is established," a guilty plea does not bar direct appeal. *Menna*, 423 U.S. at 63 n.2. A competency claim, like double jeopardy, is an assertion that "the charge is one which the State may not constitutionally prosecute." *Id.; see also Journigan v. Duffy*, 552 F.2d 283, 289 (9th Cir. 1977) (finding that a claim questioning the constitutionality of a statute was not waived by a guilty plea because of its jurisdictional nature); *People v. White*, 308 N.W.2d 128, 134 (Mich. 1981) (applying similar reasoning to a defendant's claim of

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[2] This Court has, of course, granted review in criminal cases even absent a split among the lower courts or state courts of last resort. *See, e.g., Snyder v. Louisiana*, 552 U.S. ___, 2008 WL 723750 (2008); *Rompilla v. Beard*, 545 U.S. 374 (2005).

entrapment). In these instances, no matter how strong the State's case against the defendant may be, the government may not prosecute the charge. The question presented in this case thus involves a clear application of this Court's decisions in *Blackledge* and *Menna*.[3]

Indeed, competency claims present a *stronger* case for exemption from the guilty plea waiver rule than double jeopardy. While both present bars to prosecution, the State cannot prosecute an

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[3] The government seeks to limit the scope of *Blackledge* and *Menna* by arguing that the double jeopardy claims at issue there were apparent from the complaint as "'judged on its face.'" Opp. 8-9 (citing *United States v. Broce*, 488 U.S. 563, 575 (1989) (quoting *Menna*, 423 U.S. at 62)). But the government is wrong to suggest that the Court's use of the phrase "judged on its face" excludes the competency claims at issue here. Even double jeopardy claims cannot be evaluated on the "face" of the complaint because such claims require an examination of the prior proceedings. The Court's reference to "judged on its face" means in context only that the defendant's claim must be assessed on the record as it stands at the time of the guilty plea. As the Court explained in *Broce*: "In neither *Blackledge* nor *Menna* did the defendants seek further proceedings at which to expand the record with new evidence. In those cases, the determination that the second indictment could not go forward should have been made by the presiding judge at the time the plea was entered on the basis of the *existing record*. Both *Blackledge* and *Menna* could be (and ultimately were) resolved without any need to venture beyond that record." *Broce*, 488 U.S. at 574-76 (emphasis added). Broce, on the other hand, wanted to add evidence to the record to prove his double jeopardy claim, and this Court denied his appeal. *Id.* at 576. Thus, even if "judged on its face" states a constitutional requirement, Mr. Wallace's competency claim satisfies that requirement.

incompetent defendant for important and unique reasons: he cannot understand the charges or proceedings against him, make legally binding decisions, or assist in his defense. It is, therefore, particularly troubling to presume that a defendant whose competency is at question could comprehend the significance of a waiver of his right to direct appeal on the issue of competency when he pleads guilty *See Pate*, 383 U.S. at 384 ("But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."). This Court's review is, therefore, needed to state explicitly what *Blackledge*, *Menna*, and *Pate* already require; under the Due Process Clause, a defendant who pleads guilty nonetheless retains the right to contest on direct appeal a trial court's competency determination.

III. The Court Of Appeals' Refusal To Permit Direct Appeal Was Outcome Determinative.

The government next attempts to diminish the importance of Mr. Wallace's petition by asserting that resolution of the question presented "would have no substantive impact on this case." Opp. 13. That is incorrect. There is a substantial difference between direct appeal of a competency determination and appeal of a trial court's denial of a motion to withdraw a guilty plea. And, that distinction was outcome determinative for Mr. Wallace.

The government's contention rests principally on the argument that "any direct appeal...would not

have been substantially different from the appellate review petitioner received," because "even on direct appeal petitioner's competency determination would be reviewed only for abuse of discretion" — "the same standard by which" a court would review a denial of a motion to withdraw a guilty plea. Opp. 13-14. But while discussing the relevant standard of review, the government ignores the more essential question: whether the particular decisions under review differ substantially based on their avenue of appeal. They do.

In the jurisdictions that allow a direct appeal, the court reviews directly the competency decision. On the other hand, in jurisdictions that preclude direct appeal, the reviewing court reviews only the trial court's determination that no "manifest injustice" will result if the guilty plea stands. The significant distinction between these questions is the burden the defendant carries in the trial court's initial determination. The competency question is resolved by a preponderance of the evidence inquiry. *See Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996). The defendant has a vastly greater burden when he moves to withdraw a guilty plea. *See* Pet. 24-25. Thus, individuals such as Mr. Wallace actually face a double hurdle on appeal when they are forced to present their competency claim in the guise of a motion to withdraw their guilty plea. The essential questions the court asks and the underlying burdens of the decisions they review are materially different. As a result, review of a denial of a motion to withdraw a guilty plea is no substitute for direct review.

The course of proceedings below confirms that understanding and belies the government's new position here that the avenue of relief is irrelevant. In the Court of Appeals, the government aggressively opposed Mr. Wallace's effort to obtain direct review of his competency, arguing that his case should be reviewed instead under "the exacting 'manifest injustice' standard." Gov't Br. at 26 (D.C. filed June 1, 2006). And in the trial court, the government refused Mr. Wallace's request to enter a conditional plea that preserved direct review of his competency claim, an action that is inexplicable if the avenue of relief were truly no different.

Likewise, the D.C. Court of Appeals plainly believed that there was a difference in the two avenues for relief because it spent significant time resolving the question presented without ever suggesting that its resolution of that question was unnecessary.

Finally, it cannot be ignored that the distinction at the heart of this petition mattered in Mr. Wallace's case. As noted in the petition (and in the decision below), Mr. Wallace had previously been found incompetent, and prior to the release that led to the instant crime had spent eight months in St. Elizabeth's. Pet. 3; Pet. App. 74a-76a. The doctors who had treated him over that period concluded that he was "severely impaired"; was "unable to manage the basic concepts associated with competency to stand trial"; and would be "unlikely" to "attain competency in the foreseeable future." Pet. 5. Their reports, as well as confirming testimony from other

experts, were submitted at the trial court. In contrast, the government's meager evidence of "malingering" was based on brief interviews and was contrary to the physical evidence provided by EEGs. *See* Pet. 7 ("'[T]here's no way you can fake or malinger an abnormal EEG") (quoting expert testimony). Even under the narrow scope of review the District of Columbia Court of Appeals employed, the court deemed this "a difficult case." Pet. App. 1a. Due Process demands that this "difficult case" be resolved by a court applying the proper standard and asking the right questions.

IV. The Government Refused To Allow Petitioner To Enter A Conditional Plea, Confirming That The Purported "Widely Available Alternative" Of Conditional Pleas Provides No Grounds To Deny The Petition.

Finally, the government contends that Mr. Wallace "overstates the significance of the issue" because defendants in many jurisdictions "can enter a conditional guilty plea that reserves the right to appeal." Opp. 15. Indeed, the government touts conditional pleas as a "widely available alternative" that relieves defense counsel of any "dilemma," *see* Pet. 25-27, and deprives the petition of "broad significance." Opp. 16.

That argument is simply disingenuous. As the government well knows — but neglects to inform the Court — Mr. Wallace *did seek* a conditional plea, and the government refused to permit it. Indeed, in its brief to the D.C. Court of Appeals, the government

touted this fact: "Appellant's counsel had sought a conditional plea allowing direct appeal of the competency ruling, but at the plea colloquy, the prosecutor expressly declared 'this will not be any type of conditional plea with respect to Mr. Wallace's appellate rights concerning . . . for example . . . the competency proceeding that already took place' (1/5/05 Tr. 7)." Gov't Br. at 15 n.5 (D.C. filed June 1, 2006) (omissions and citation in original). For the government to deny Mr. Wallace a conditional guilty plea and then assert that the petition should be denied because such conditional guilty pleas are "widely available" is the height of arrogance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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